No. 15852

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE CLAUDE MCCOLLOCH, Judge.

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STATEMENT OF THE CASE

Defendant appeals from a judgment and amended judgment entered by the district court in favor of the plaintiff railway company for the stipulated amount of $30,997.00 (R. 64-65).

In the first pretrial order, thirteen separate actions brought by the plaintiff under the Tucker Act (28

U.S.C.A. § 1346(a)(2) were consolidated for trial (R. 12). Prior to the entry of judgment, five of the actions were severed and disposed of by separate judgments or orders of dismissal (R. 40-41, 53).

The stipulations of fact contained in the two pretrial orders (R. 3-10, 28-37, 41-46) eliminated the need of testimony as to great many basic facts. The first pretrial order presented to the court the one segregated issue as to whether certain rail shipments made by the United States during the years 1942-1945 under 47 separate requisitions submitted by officials of the Soviet Government Purchasing Commission (R. 28-37) embraced "military or naval property of the United States moving for military or naval and not for civil use," as those words are used in Section 321(a) of the Transportation Act of 1940 (R. 13).

With respect to that issue, the following facts were stipulated:

(1) By reason of releases filed with the Secretary of the Interior, pursuant to Section 321(b) of the Transportation Act of 1940, the United States was bound to pay to plaintiff and its connecting carriers the full applicable commercial rates for rail transportation of property of the United States, except that the United States was entitled to land-grant rates with respect to "military or naval property of the United States moving for military or naval and not for civil use" (R. 5).

(2) During the years 1942 to 1945 plaintiff and connecting interstate carriers transported on government bills of lading certain property of the United States from

Eastern, Midwestern and Western points to Columbia River ports in Oregon and there made delivery to the consignees. All of the shipments were made for the account of the Procurement Division, United States Treasury Department, which under authority delegated to it by the President had procured the property for the United States and authorized its shipment to Soviet Russia under the provisions of the Lend-Lease Act (22 U.S.C.A. §§ 411-419). The property was procured as a result of requisitions received from authorized officials of the Soviet Government Purchasing Commission in the United States in accordance with procedures established under the Lend-Lease Act (R. 6).

(3) The particular shipments involved in this appeal fall into eight categories: (1) lunite hydraulic cement; (2) petroleum refineries and machinery for the oil industry; (3) electric generators, generator sets, diesel engines and generating stations; (4) electrical power plants and equipment for hydroelectric power plants; (5) equipment for steel mills; (6) oil drilling and coal mining tools and equipment; (7) caustic soda; and (8) bunker coal. Attached to the pretrial order was a schedule enumerating the particular shipments and disclosing information which appeared on the face of Lend-Lease requisitions submitted by officials of the Soviet Government Purchasing Commission. The most frequent notation on these requisitions as to use was "War Industry—U.S.S.R." or "Military Production" (R. 28-37).

(4) The bills which plaintiff rendered to defendant

for the transportation of this property were paid in full. Thereafter, upon post-payment audit of the bills, the General Accounting Office contended that the United States was entitled to land-grant deductions on each of these shipments on the ground that they consisted of "military or naval property of the United States moving for military or naval and not for civil use," and that deductions would be made from amounts otherwise due to plaintiff unless the alleged overpayments were refunded within sixty days. When plaintiff failed to refund these amounts, the United States thereafter deducted the amounts corresponding to the alleged overpayments from payments for subsequent transportation services (R. 7). Plaintiff's cause of action in each instance was to recover these deductions from current freight bills (R.7-8, Ex. 29).

These consolidated cases came on for trial upon the pretrial order and the one segregated issue framed therein (R. 109). At the trial, all the exhibits (Nos. 1-29) were marked and admitted in evidence as the joint exhibits of both parties. These exhibits included certified copies of all the requisitions (Exs. 1-8). There were also introduced various documents taken from the government's files, as well as copies of many of the President's Reports to Congress on Lend-Lease operations during the war years (Exs. 16-26) and a pamphlet issued by the Department of State entitled "Soviet Supply Protocols" (Ex. 27).

At the trial the plaintiff rested upon this record of stipulated facts and documentary evidence. Defendant

called one witness, Mr. Harry F. King (R. 111-133), and later took the deposition in San Francisco of Brigadier General Philip R. Faymonville (R. 70-107, Ex. 30), who was unable to testify at the trial because of illness (R. 133).

After trial both parties submitted briefs to Judge Fee who filed his opinion on September 9, 1955, holding that except for property falling within the category "Equipment for Soviet Arctic Bases," none of the property involved was military or naval property of the United States moving for military or naval and not for civil use. As will be hereinafter shown, Judge Fee accepted plaintiff's thesis that this issue was controlled by the decision of the United States Supreme Court in *United States v. Powell,* 330 U.S. 238, 67 S. Ct. 742, 91 L. Ed. 868.

Following Judge Fee's decision, this consolidated case was transferred to the calendar of Chief Judge McColloch for further proceedings. The parties then entered into further pretrial stipulations with respect to transportation rates and charges based upon Judge Fee's opinion, and without prejudice to defendant's right to challenge this decision on appeal. All the remaining questions of fact and law were disposed of by the parties in these further pretrial conferences, except the one issue as to whether or not defendant was entitled to through export rates on shipments covered by 22 separate bills of lading (R. 52-53). The right to the export rate turned on whether or not the defendant had complied with Item 270(a) of Trans-Continental Freight

Bureau West-Bound Export Tariff No. 29-Series, which provided in pertinent part: "Rates authorized apply only to export traffic when specific destination beyond Pacific Coast port of export is shown in the bill of lading or shipping receipt issued at time of shipment."

After the severance of five of the actions from the consolidated proceeding, the court approved a supplemental pretrial order (R. 40-50) which segregated for separate trial the one question as to whether a notation "U.S.S.R." on a representative bill of lading was a "specific destination beyond Pacific Coast port of export" within the meaning of Item 270(a) of Transcontinental Freight Bureau West-Bound Export Tariff No. 29-Series (R. 46).

With respect to this issue, the specific provisions of the tariff were stipulated; it was agreed that one government bill of lading (DA-TPS-281224) was representative of all the bills of lading involved. It was further stated in the supplemental pretrial order that all of the shipments were in fact exported in the years 1942-1945, inclusive, by ocean carrier to the U.S.S.R. and to an area in Russia west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude (R. 44).

This issue then came on before Judge McColloch for trial upon the supplemental pretrial order. At the trial the applicable tariff provisions, an agreed computation of charges and the representative bill of lading were offered and received into evidence as joint exhibits (R. 139). After some argument on the tariff question, de-

fendant called one witness, Mr. Thomas McNeill, a transportation specialist in the General Accounting Office. A motion to strike his testimony as to the computation of rates was made "on the ground that it is not material or relevant to the specific issue in this case, which is the question of law as to the construction of this tariff." The court ruled that the testimony might stand subject to the objection (R. 150).

Briefs were filed by both parties following the trial, and the court thereafter ruled that the United States was not entitled to through export rates on the shipments covered by the 22 separate bills of lading. The court found that defendant had failed to comply with the provisions of Item 270(a) of the export tariff because the specific destination or destinations beyond the Pacific Coast port of export were not shown in any of the bills of lading issued at the time of shipment, and that the ". . . notation 'U.S.S.R.' under 'Marks' on each of said bills of lading was not a showing of specific overseas destination" (R. 62). While the court did not prepare a formal opinion, the record indicates that Judge McColloch followed the unanimous decision of the Court of Claims on the identical point in *Union Pacific Railroad Company v. United States,* 132 F. Supp. 230 (R. 137-139).

Judge McColloch further reviewed the entire proceedings. He concurred in Judge Fee's previous decision, and adopted the court's opinion of September 9, 1955. Therefore, Judge McColloch entered findings of fact and conclusions of law on both of the land-grant and export rate questions (R. 51-63).

On August 26, 1957, the court entered judgment in favor of the plaintiff in the amount of $30,997.00 (the amount being stipulated on the basis of the court's rulings). On September 17, 1957, an amended judgment was entered providing for interest thereon "to the extent authorized by law" (R. 64-65). The defendant's notice of appeal was filed October 21, 1957 (R. 65-66).

STATUTE INVOLVED

Section 321(a) of the Transportation Act of September 18, 1940, 54 Stat. 954, 49 U.S.C. (1940 Ed.) 65(a), provided as follows:

> "Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with

> the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

The statutory exception was repealed by the Act of December 12, 1945, 59 Stat. 605, effective October 1, 1946, which provided that transportation specifically contracted for prior to the effective date should be paid for at the rate in effect at the time of entering into such contract of carriage or shipment.

INTRODUCTION

Defendant's brief is replete with statements that at the trial plaintiff introduced "no evidence whatsoever" on the first segregated issue as to whether the shipments were "military or naval property of the United States moving for military or naval and not for civil use," and thus entitled to land-grant deductions (App. Br. pp. 13, 16, 18, 22). On this assumption the argument is advanced that the very recent case of *United States v. New York, New Haven & Hartford R. Co.,* 355 U.S. 253, 78 S. Ct. 212, 2 L. Ed. 2d 247, "requires a reversal" because that case holds that any carrier has the "burden of proof" as to the correctness of the charges challenged by the Comptroller General on the post-audit (App. Br. p. 15).

The *New Haven* case actually holds, as we shall later demonstrate, that the burden of proof requirement is not changed by the procedure of Section 322 of the Transportation Act of 1940 (49 U.S.C.A. § 66), which provides for payment by the government of transporta-

tion charges upon the presentation of the bills. The immediate payment is subject to review by the General Accounting Office, and to the right to repayment of overcharges, usually exercised through deductions from amounts found due on subsequent transactions.

In the *New Haven* case, the court held that since the railroad had the burden of proving the correctness of the charges billed, that burden had not shifted to the government because of the Section 322 procedure. In the case at bar, the facts require the opposite assumption; in an action by the carrier to recover the amount of the charges as billed, the government would have had the burden of proving the facts entitling it to the statutory exception of land-grant deductions.

Since plaintiff did introduce abundant factual evidence to support its claims, defendant's statements to the contrary notwithstanding, and since all of the basic facts in question were undisputed, the burden of proof question perhaps becomes unimportant. The facts came into the record through the agreed statements of fact in the pretrial orders, and the multitude of documentary evidence introduced as joint exhibits of both parties. In fact, the only part of this record which contains any evidence apart from stipulated facts is the testimony of defendant's witnesses Mr. King, General Faymonville and Mr. McNeill, and it is plaintiff's position that this testimony, even when accepted in its entirety, adds nothing of importance to the stipulated facts in determining the correctness of the judgment below.

In other words, the two issues were resolved by the

court below as questions of law: (1) the correctness of the land-grant rate determination turns upon the proper interpretation of Section 321(a) of the Transportation Act of 1940 (54 Stat. 954); (2) the decision on the export rate issue presents only a question of the proper construction of a railroad tariff, " . . . a question of law, not differing in character from those presented when the construction of any other document is in dispute" (*W. P. Brown & Sons Lumber Co. v. Louisville & Nashville R. Co.,* 299 U.S. 393, 397, 57 S. Ct. 265, 81 L. Ed. 301; *Union Pacific Railroad Co. v. Ore-Ida Potato Products,* 252 F.(2d) 505, 507 (CA9)). As stated by Judge Fee in *Walling v. California Conserving Co.,* 74 F. Supp. 182, 183 (N.D. Cal.), aff'd 166 F.(2d) 905 (CA9), cert. den. 335 U.S. 845, 69 S. Ct. 69, 93 L. Ed. 395: " . . . the doctrine of burden of proof applies not to the interpretation of the statute, but only to the weight of the evidence of fact." The same observation is equally applicable to the construction of a written tariff. Thus, irrespective of any contentions made by the parties in this case, the doctrine of burden of proof was not decisive, or perhaps of primary importance, in the proceedings below.

SUMMARY OF ARGUMENT

1. The industrial equipment and supplies moving to Russia during World War II pursuant to Lend-Lease Act procedures were not shown to be "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of

Section 321(a) of the Transportation Act of 1940 and the Lend-Lease Act, as construed by the United States Supreme Court in *United States v. Powell,* 330 U.S. 238, 67 S. Ct. 742, 91 L. Ed. 868.

2. The recent case of *United States v. New York, New Haven & Hartford R. Co.,* 355 U.S. 253, 78 S. Ct. 212, 2 L. Ed. (2d) 247, is not relevant to the case at bar. It holds that Section 322 of the Transportation Act (49 U.S.C.A. § 66) does not change the burden of proof otherwise governing the parties. In that case, the carrier, irrespective of Section 322, would have had to plead and prove its right to a higher charge based upon the fact that the shorter railroad cars ordered by the government were unavailable; and the facts as to the availability of cars were peculiarly within the knowledge of the carrier. In the case at bar, defendant claimed the benefit of a special statutory exemption entitling it to a reduced rate. Under these circumstances, the burden of proof was upon defendant to establish its right to the lower charges, the facts on this issue being within the peculiar knowledge of the defendant.

3. The defendant was not entitled to the export rate by reason of noncompliance with Item 270(a) of Transcontinental Freight Bureau West-Bound Export Tariff No. 29-Series, since the representative bill of lading showed "destination" only as "Portland, Oregon," and the notation "U.S.S.R." under "Marks" was not a showing of "specific destination beyond Pacific Coast port of export."

ARGUMENT

I

The decision in United States v. Powell, 330 U.S. 238, 67 S. Ct. 742, 91 L. Ed. 868, compels the conclusion that the shipments of industrial equipment and supplies to Soviet Russia under the Lend-Lease Act were not entitled to land-grant rates.

Defendant attacks Judge Fee's opinion in the court below (R. 38-40) on the ground that the court's critical inquiry was whether the shipped property, or the products thereof, actually reached a battleground, or were otherwise directly employed against the enemy rather than the use intended at the time of the rail shipment (App. Br. pp. 16, 22). This is an unwarranted distortion of the true basis of the court's opinion. Judge Fee's determination rested upon quite a different basis. In fact, he rejected the contentions of defendant and its witnesses that because the economy of Soviet Russia during World War II was "utterly geared for war" no shipment made to the Soviet Union pursuant to the Lend-Lease Act ". . . could possibly have been devoted to any other purpose" (R. 39).

The government's theory on this point is borne out by General Faymonville's testimony on direct examination (R. 90):

> "Q. General, will you state whether in your discussions with the Russian representatives, with respect to the power program, any statements were made that any of the power equipment was intended to supply power for production other than equipment to be used by the Soviet armed forces?

A. Yes, the matter did come up for discussion. It came up for discussion because I had been instructed to raise the point in instructions from Washington. I did raise it and in all cases received assurances that production for other than military purposes, purposes other than the direct prosecution of the war—there simply were no such cases—civilian production was virtually non-existent. By civilian production, I mean production for civilian use.

In the first place, there were almost no civilians as we know the word 'civilian.' All the inhabitants of the Soviet Union were in some measure drawn into the fighting forces or the immediately supporting agencies of the fighting forces."

On cross-examination, the witness stated (R. 103-104):

"Q. It is your testimony, isn't it, General, that the entire Russian economy was completely geared for war, is that right, during the hostilities?

A. Yes, sir, it is my observation that after the invasion by Hitler and the reconstitution of Russian economy on a war basis that that was true.

Q. Well, was the Government of Russia, was it run by the military or was it run by civilian agencies?

A. By the government of Russia. I assume an answer would properly specify the executive branch of the Soviet Government. The executive branch of the Soviet Government continued its control over all the agencies of that Government in the form of commissariats equivalent in general to an American executive department of the Government.

Q. Yes?

A. To answer your question, they did continue to control the operations of the Russian Government.

Q. Well, wouldn't you say that these commissariats like the Commissariat of Heavy Industry

and the Commissariat of Railways and this Sovflot, were they not civilian agencies as we think of the term civilian?

A. Well, we have to be precise about definitions here. My answer to your question is no, they were not civilian agencies as we think of civilian agencies, because no such things as our concept of civilian agencies existed in the Soviet Union. They were governmental agencies not independent of the Government and not free to conduct operations independent of Government schedules, Government plans, Government economic rules."

However, Judge Fee held that the clear-cut distinction which Congress made between "military" and "civil" use must control, irrespective of the fact that so-called "civilian" activities were nonexistent in the Soviet Union during World War II. The nub of Judge Fee's decision is in this one sentence of his opinion (R. 39): "The clear dichotomy between military or naval use and civilian use, which Congress drew in the statute, must be obliterated before such a result can be attained." The result which the court was referring to was the classification of industrial equipment and supplies as "military or naval property of the United States moving for military or naval use," merely because there was no such concept as civilian use in the Soviet Union during the years 1941-1945.

Thus, in rejecting the concept that because all the shipments involved herein were "defense articles" as defined in the Lend-Lease Act of 1941 (22 U.S.C.A. §§ 411-419), they were entitled to land-grant rates, Judge Fee followed the controlling decision in *United States v. Powell,* 60 F. Supp. 433 (D.C. Va.), aff'd 152 F.(2d)

228 (CA4), aff'd 330 U.S. 238, 67 S. Ct. 742, 91 L. Ed. 868.

Defendant's brief relies primarily upon *Northern Pacific Ry. Co. v. United States,* 330 U.S. 248, 67 S. Ct. 747, 91 L. Ed. 876, and decisions following it (App. Br. pp. 29-34). These cases did not involve shipments under the Lend-Lease Act. While the shipments in the *Northern Pacific* case did not consist of articles which would be classified as military, they were intended for use in military operations. An example is bowling equipment for recreational use by the armed forces.

The *Powell* decision is the one authoritative United States Supreme Court case interpreting and relating the Lend-Lease Act to Section 321(a) of the Transportation Act of 1940. That case involved World War II shipments by the United States of phosphate rock and superphosphate. This material was exported to Great Britain under Lend-Lease and consigned to the British Ministry of War Transport for use as farm fertilizer under Britain's wartime program for intensified production of food. The Supreme Court, per Mr. Justice Douglas, found that this fertilizer would make possible increased food production, thus sustaining the war production program and making possible the continued manufacture of munitions, arms and other war supplies necessary to maintain the armed forces. Nevertheless, the court determined that the shipments were not entitled to land-grant rates because the standard written into Section 321(a) did not reflect the necessities of national defense or the demands which total war makes on an

economy. Instead, Congress used more conventional language—"military or naval" use, as contrasted with "civil use," thus emphasizing " . . . a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it" (330 U.S. at p. 245).

In that case, the government contended that the Lend-Lease Act was enacted as a military measure, that its primary purpose was to secure the military defense of the United States, and that all Lend-Lease shipments, whether to be used indirectly or directly in the war effort, were "defenes articles" and were military property moving for a military use (330 U.S. 238). In the opinion of the district court, the following contention of the government was quoted from its brief (60 F. Supp. at p. 438):

> " 'In an integrated war economy, the supply of raw materials, the exploitation of the industrial plant, and the utilization of the land for food production are directly related to war. With modern science and changed methods of war transforming many substances once considered unimportant for a belligerent's purposes into strategic military material, the general language "military property" cannot be limited to the precise items which would have been embraced within it centuries ago.' "

The phosphate rock shipped was to be used as fertilizer in the production of food; and it was urged that the phosphate shipments had the direct function of keeping Britain actively in the fight against Germany, and that although the use was initially through civilian farmers, that use was decidedly a military and not a civil use.

cause Russia at that time made no distinction between production for military purposes and production to meet the needs of its people. This is made plain by General Faymonville's testimony (R. 98):

> "Q. What happened to the third 'five-year plan' upon the invasion of Russia by the Germans?
>
> A. The Soviet Government immediately through all media of communication announced that the exact provisions of the third five-year plan were being suspended, that the country was entering as of that minute into a war economy, and that all the efforts of the inhabitants and all the resources of the industry of the country were to be devoted to the production of those items which would assist immediately—immediately assist in the war effort."

In discussing the use of petroleum products in Russia during World War II, General Faymonville stated (R. 101):

> "A. Petroleum products were not produced in sufficient volume even to satisfy the needs of the Red Army and the Red Air Force so that none were ever available for other purposes. This is not to say, however, that the Government neglected or starved auxiliary activities such, for instance, as tractors on collective farms or other petroleum requirements which were in essential support of the war effort."

General Faymonville's reservation states the obvious. No war economy could neglect or starve "auxiliary activities" essential to maintain the health and vigor of the country's citizens. "War Industry" in the requisitions included power plants (R. 31, 33, 34). However, these plants, although operated by a government without a "civil" economy, could not limit their operations

to the production of power required for munitions, arms or other supplies for the armed forces.

When these Lend-Lease shipments were made, whether of power plants, petroleum refining facilities, electric generators, diesel engines, equipment for steel mills, oil drilling and coal mining machinery, caustic soda or bunker coal, it would have been impossible to make the distinction required by Section 321(a).

It does not help defendant's case to say that in the Soviet Union there was no "civil" use. There was in fact no civil *economy,* but there was necessarily civil *use.* This civil use, though government-directed and designed to promote the war effort in every way, was essentially the same as the use of Lend-Lease materials in Great Britain which were involved in the *Powell* case. Great Britain had a civil economy, but there is no doubt that with total war facing it, all civil activities were subordinated to the military effort.

The Supreme Court pointed out in the *Powell* case that Congress was fully advised of this, but nevertheless undertook to preserve the distinction between shipments designed to strengthen our allies, and in that way to promote the war effort, and shipments intended for use directly in military or naval activities.

Defendant asks this court to ignore this distinction and to apply the reduced rates to commodities commonly used in civilian operations upon the ground that in World War II all Russian industrial activities were military. The complete answer is in the ruling of the *Powell*

case: that in the intepretation of Section 321(a) the distinction between "military" and "civil" which "common parlance marks" must be preserved (330 U.S. at p. 246).

Defendant also cites *Southern Pacific Company v. United States,* 67 F. Supp. 966 (Ct. Claims), cert. den. 330 U.S. 833, 67 S. Ct. 964, 91 L. Ed. 1381, which involved the shipments of motor vehicles and parts to China under Lend-Lease arrangements. However, the vehicles conformed structurally to military specifications, and the carrier did not even claim that they were for "civil" use. In the case at bar, there was no claim that any of the property was specially built or constructed to conform to military specifications.

The *Southern Pacific Company* case is also cited for the proposition that the notation on the requisitions submitted by officials of the Soviet Government Purchasing Commission (R. 28-37) as to use were "at least *prima facie* evidence of intended military use of the property" (App. Br. p. 35). However, a later decision by the Court of Claims in *Chicago and Northwestern Railway Company v. United States,* 124 F. Supp. 359, casts doubt as to whether such a statement on a requisition or bill of lading is any indication of the true character of the shipment. In that case, it was held that shipments of scrap steel owned by the government and shipped during 1944 and 1945 from West Coast shipyards to midwest steel mills were not entitled to land-grant rates even though the bills of lading contained the consignor's endorsement: "Military

or naval property of the United States moving for military or naval and not for civil use." In holding that the shipment was not entitled to land-grant rates even though the consignees were steel mills doing important defense work, the court held (124 F. Supp. at p. 361):

> "The facts clearly establish that the scrap was to be put to a predominantly civil use. It may well be that the plants here involved were doing work of importance to the defense of the country, but if that alone were a sufficient criterion a substantial distinction between military and civil uses could hardly ever be made in time of war.
>
> * * * * *
>
> "The unilateral declaration on the part of the Government that the cargo was moving for military or naval use was not sufficient to determine the question whether or not the cargo was actually so moving."

In a more recent case, *The Atchison, Topeka and Santa Fe Ry. Co. v. United States,* 130 F. Supp. 593 (Ct. Claims), cert. den. 350 U.S. 883, 76 S. Ct. 136, 100 L. Ed. 779, it was held that full commercial rates were applicable to shipments under Army bills of lading, despite the fact that each contained a statement that the articles were military property moving for military use (see 132 Ct. Claims at p. 762).

Defendant's brief emphasizes that the nature and status of the shipments should be determined at the time of the shipment. Since there was no agreement between the carriers and the defendant as to the character of the shipments involved at the time or during the course of shipment, the court necessarily has to examine the relevant data in the record on this point.

Here it is stipulated that all the shipments were made for the account of the Procurement Division, United States Treasury Department, which, under authority delegated to it by the President, had procured the property for the United States and authorized its shipment to Soviet Russia under the Lend-Lease Act (R. 6).

Therefore, the intention of the President, as expressed through his administrative agency, the Procurement Division of the United States Treasury, is of some significance in determining the character of Lend-Lease shipments.

The President's Reports to Congress on Lend-Lease Operations (Joint Exhibits 16-26) treated military equipment or "munitions" as separate from the property here involved, which fell into a separate category, labeled "Industrial Items" or "Industrial Products." In the tables in each report outlining the various categories of Lend-Lease shipments, Lend-Lease aid is broken down under the following classifications: Ordnance, aircraft, tanks, motor vehicles, watercraft, miscellaneous military equipment, and in some of the later reports these categories are lumped under "munitions." The classification of "Industrial items and products" or "Industrial materials and products" is always separate, as is the category of "agricultural products." (See, e.g., Ex. 16, p. 11; Ex. 17, p. 20; Ex. 18, p. 19; Ex. 20, p. 17; Ex. 21, p. 31; Ex. 22, p. 25; Ex. 23, p. 30; Ex. 24, p. 19; Ex. 25, p. 15 and Ex. 26, p. 21.)

Other portions of the President's Reports indicate that at all times a clear line was drawn between the

shipments of military equipment or munitions to Russia and the lend-leasing of industrial equipment and machine tools. For instance, in the report for the period ending April 30, 1943 (Ex. 17, p. 21), it was stated:

> "Shipments to Russia of military equipment have included thousands of planes, many tens of thousands of trucks, jeeps, and other military motor vehicles, hundreds of thousands of miles of field telephone wire, several million pair of army boots, and large amounts of other military supplies. Lend-lease shipments have also included hundreds of thousands of tons of armor plate, steel aluminum, copper, zinc, T.N.T., and chemicals for the production in Russia of planes, tanks and bombs; electric furnaces, presses, forging hammers, and various types of machine tools for Soviet arms factories; electric power generating equipment for Soviet war industries and quantities of rails and other supplies for railroads and communications."

In the report for the period ending July 31, 1943 (Ex. 18, p. 19), it was noted:

> "About 57 percent of the goods sent to the U.S.S.R. since the inception of the first protocol have been munitions such as airplanes, tanks and guns. We have sent more lend-lease planes there than to any other country. Large quantities of supplies for her transportation and communication systems have been sent to aid the movement of the weapons of war over vast distances to her armies at the front. We have shipped to the Soviet Union more than 100,000 tons of rails and accessories. Quantities of automatic block signal system equipment for the U.S.S.R. are in production. We have shipped more than 150,000 motor vehicles, over 600,000 miles of telephone wire and approximately 190,000 field telephones.
>
> "Shipments to the U.S.S.R. have also included thousands of tons of raw materials and machinery

to help replace the output of war plants in areas now occupied by the Nazis. Included in these shipments have been aluminum, copper, steel and large amounts of chemicals and explosives used in the manufacture of ammunition and bombs. We have purchased a few existing plants in this country and shipped them to Russia with machinery for new ones as well."

In the report for the period ending December 31, 1944 (Ex. 24, p. 21), the following statement is found:

"Before the Nazis overran the Ukraine in 1941 the Soviets themselves destroyed essential parts of the $110,000,000 Dnieperstroi Dam. The Nazis wrecked it further and other electrical plants as well, as they retreated. To provide electric power for war industries in liberated areas, we developed in this country a power train. It consists of a complete steam generating unit mounted on railroad flat cars, which can be moved from city to city or industry to industry as the need demands. As soon as the local utilities are functioning again, the power train moves on to 'spark' the industries in another district. Up to December 1, 1944 we had sent 60 of these trains and the Soviets had already put some of them to good use in the Donets Basin."

Joint Exhibit 27 entitled "Soviet Supply Protocols" shows just as clearly that military supplies falling within the category "Armament and Military Equipment" were listed in a category separate from "Various Material, Machinery and Industrial Equipment" and "Equipment and Materials for Specific Industries" (Second Protocol, pp. 19, 22, 29; Third Protocol, pp. 56, 71; Fourth Protocol, pp. 95, 96, 111). All of the shipments at bar are listed in machinery and equipment categories, rather than under the armament or military supply categories.

In the *Powell* case, the classification drawn between military and nonmilitary goods in the reports to Congress on Lend-Lease operations was deemed of the utmost significance. The district judge stated on this point (60 F. Supp. at pp. 438-439):

> "In the several reports a distinction is drawn between military and non-military goods. For example, in the report of August 24, 1944, Table No. 3, appearing on page 11, is denominated: 'Quantities of Non-Military Goods Transferred', and among other items listed fertilizer—the article with which we are now concerned. Similar instances appear at many places in the various reports and innumerable illustrations of the transfer of articles strictly for use by civilians might be shown.
>
> "It would appear that Congress adopted or approved this interpretation. The President has repeatedly reported to Congress the distribution of huge quantities of non-military and distinctly civilian goods and with these reports before it Congress has endorsed and approved this course by enabling its continuance by the enactment of the necessary appropriations acts.
>
> "The construction given to a statute by the Executive Department charged with its administration is entitled to great weight."

In affirming the judgment below, the Court of Appeals for the Fourth Circuit stated (152 F.(2d), at pp. 229-230):

> "An even stronger reason against the Government's contention is the fact that the whole history and administration of the Lend-Lease Act show definitely that two separate types of assistance were contemplated: (1) Military or naval; (2) civil. Nowhere is this more cogently shown than in the numerous reports of President Roosevelt to Congress on

just what had been done in administering the Lend-Lease Act. On the strength of these reports, Congress continued to make further Lend-Lease appropriations and no amendment of the Transportation Act was made or sought.

"A few items from these reports of the President (which could be indefinitely multiplied) must suffice. Thus Chapter 3 of the Fourth Report (pages 19-21) expressly divides Lend-Lease goods already shipped into three classes: (1) Military, (2) Industrial, and (3) Agricultural. A like classification is found in the Fifth Report (page 9). The same is true of the Seventh Report where (page 9) it is stated: 'Exports of *military* items have arisen much more rapidly than exports of *non-military* items.' (Italics ours.) The Third Report (pages 24-26) mentions the appearance of Lend-Lease Goods 'on the grocers' shelves and in the kitchens of Great Britain,' and states that 1,300,000 small children were receiving 'a regular supply of concentrated orange or black-current juice, and of cod liver oil compound.' The Tenth Report (page 20) mentions 'supplies needed to prevent a breakdown of the civilian economy.' (Italics ours.) Finally, in the Fifteenth Report (page 38) we find: '*Civilian* supplies shipped to French Africa under Lend-Lease. * * * We have sent to Tunisia and Morocco, for example, equipment to increase production of the phosphate mines. The fertilizer produced by these mines is needed both for the United Kingdom's intensive food production program and for the restoration of food production in the liberated areas of occupied Europe.' (Italics ours.)"

While the United States Supreme Court discussed other aspects of the question in affirming the decision of the lower courts in the *Powell* case, it is noteworthy that at no place in its opinion was any part of the lower courts' opinions disapproved or criticized.

II

The decision in United States v. New York, New Haven & Hartford R. Co., 355 U.S. 253, 78 S. Ct. 212, 2 L. Ed. 2d 247, is not relevant to the case at bar.

Before reviewing the facts of the *New Haven* case, it is important to note that courts customarily use the phrase "burden of proof" in two senses. This sometimes leads to confusion. As stated by this court in *Wong Kam Chong v. United States,* 111 F.(2d) 707, 710:

> "The apparent confusion has probably been caused in large part by the two meanings commonly given 'burden of proof'. Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the duty to offer evidence, or the duty to go forward with the evidence."

[See also, *Hill v. Smith,* 260 U.S. 592, 43 S. Ct. 219, 67 L. Ed. 419; *Pacific Gas & Electric Company v. S.E.C.,* 127 F.(2d) 378, 382 (CA9); *Northwestern Electric Co. v. F. P. C.,* 134 F.(2d) 740, 743 (CA9), aff'd 321 U.S. 119, 64 S. Ct. 451, 88 L. Ed. 596.]

In the *New Haven* case, the phrase "burden of proof" was used by the Supreme Court in the second sense, as to the duty of the railroad to offer evidence, or to go forward with the evidence. The railroad had won in the lower courts and the government had lost because the courts had ruled that it was incumbent upon the government to plead and prove a certain crucial fact. There the railroad brought suit in the district court to

recover in full upon a 1950 shipment, over which there was no dispute. However, pursuant to Section 322 of the Transportation Act of 1940, the government upon post-payment audit had made deductions from the 1950 bill on the ground that the railroad had overcharged the government on four 1944 transportation bills which had been paid in full. The government pleaded this deduction in its defense of partial payment of the 1950 charges.

With respect to the 1944 shipments, it appeared that the initial carrier had furnished on each occasion a freight car of greater length than that ordered, and that the New Haven, as collecting carrier, had billed at the higher rate applicable to the car furnished. This higher charge was proper only if a car of the size ordered had not been available to the carrier. As stated by the Court of Appeals (236 F.(2d) 101, 103), ". . . the availability to the carrier of certain sizes of cars became the controlling question of fact in determining the validity of the charges . . ." In other words, the carrier ordinarily should have charged at the rate applicable to the car ordered. However, if such a car was not available and could not have been furnished, then, in that event, the carrier could properly bill at the rate applicable to the car furnished.

The General Accounting Office determined the overpayment upon a finding that the documents showed that longer cars were furnished than ordered, and in answering interrogatories as to whether cars of the sizes ordered were available the government maintained that

such information was peculiarly within the knowledge of New Haven, or the initial carrier, and that it had no knowledge of the fact. Presumably, neither party had the information since the railroad's position was that the government had all the information known to the carriers as to the availability of cars of the sizes ordered (355 U.S. 253, footnote 5).

At pretrial, the district court ruled that the plaintiff need not plead or prove any of the facts relating to the 1944 shipments, and that the burden was upon the government to plead and prove the facts relating to the 1944 shipments by way of set-off. Upon this basis, the district court subsequently granted the railroad's motion for summary judgment since there was no dispute as to the 1950 shipment sued upon. On appeal, this disposition was affirmed (236 F.(2d) 101).

The Supreme Court reversed on the ground that prior to the enactment of Section 322, the government could have held up payment, and if the New Haven had been forced to sue, it would have had to prove the correctness of the 1944 charges. The court held that it was not the intent of Congress, by compelling immediate payment of freight bills by the government through the medium of Section 322, to change the burden of proof and compel the government to plead and prove facts which the carrier otherwise would have had to plead and prove.

In the *New Haven* case, the facts as to the availability of smaller cars should have been within the peculiar knowledge of the New Haven or its correspondent

initial carrier, since the availability of freight cars was a matter of railroad operations. But, more important, it was incumbent upon the carrier to prove that the type of car was not available because, otherwise, the carrier would not have been entitled to charge at the rate applicable to the car furnished. The fact as to nonavailability had to be established by the carrier before it could lawfully charge the higher rate. Therefore, the case was remanded to the district court so that the New Haven could be given an opportunity to plead and prove the facts as to the availability of the freight cars ordered.

In its opinion, the court specifically pointed out that if administrative settlement were not reached prior to the enactment of Section 322, and the carrier sued to recover the amount of the bill, no one would question that it would be the carrier's duty to sustain the burden of proving the correctness of the charges. However, in a footnote, this broad rule was distinctly qualified (355 U.S. 253, footnote 5): "The ordinary rule based on considerations of fairness does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary [citations]."

In the light of this explanation, the *New Haven* case must be understood as holding that whenever the carrier had the burden of proving the correctness of its freight charges, there would be no shift of that burden because of the Section 322 procedure. It cannot be inferred from this or from anything said in the opinion that the burden of proof would be upon the railroad when the shipper demanded a special reduced rate, and

the facts which determined whether the rate was applicable were peculiarly within the knowledge of the shipper.

Even if the doctrine of "burden of proof" were of importance in the case at bar, admittedly the Section 322 procedure is of no significance in determining which of the parties here had the burden of proof. In the *New Haven* case, the facts reviewed in the opinion make clear that the railroad had or ought to have had the information and that it was required to prove the right to the higher rate claimed.

Here, the situation is just the reverse. After the General Accounting Office audit, the government asserted the statutory exception of land-grant rates upon the ground that the commodities shipped were military or naval property of the United States moving for military or naval and not for civil use. Contrary to the *New Haven* case, the plaintiff at bar had the right to recover from the defendant the "full applicable commercial rates or charges" under Section 321(a); *except* that this provision did not apply to "the transportation of military or naval property of the United States moving for military or naval and not for civil use." Therefore, it was incumbent upon the defendant to show the existence of a state of facts entitling it to the benefit of the statutory exception.

It is a well-settled rule that a party claiming a peculiar right, which is given by statute and is given only when a prescribed state of facts shall exist, has the burden of proving the existence of the facts entitling him

to such a right (*United States v. Dickson,* 15 Pet. 141, 10 L. Ed. 689; *The Edith,* 94 U.S. 518, 24 L. Ed. 167; *Canadian Pacific Ry. Co. v. U.S.,* 73 F.(2d) 831 (CA9); *Feeley v. Woods,* 190 F.(2d) 228 (CA9); *Walling v. Reid,* 139 F.(2d) 323 (CA8); *Sherman Investment Co. v. United States,* 199 F.(2d) 504 (CA8)).

It cannot be denied that the facts which determine the validity of this claim are wholly and peculiarly within the knowledge of the defendant. The burden of proving the right to a reduced rate rested upon the government, whether asserted in the defense of an action for the tariff charges or, as here, in defense of the carrier suit to recover later deductions made from current accounts due the carrier. The *New Haven* case has made it clear that the Section 322 procedure does not affect or change the burden of proof requirement as established by these well-settled legal principles.

III

The defendant failed to comply with the condition in the export tariff that specific destination beyond Pacific Coast port of export be shown in the bill of lading issued at the time of shipment.

The sole question before the court is whether or not defendant complied with all the conditions and restrictions of Transcontinental Freight Bureau West-Bound Export Tariff No. 29-Series, so as to be entitled to through export rates thereunder on 22 shipments of Lend-Lease materials exported to the Soviet Union in 1943.

The supplemental pretrial order narrowed this question down to whether or not defendant had complied with the mandatory requirement of Item 270(a) of that tariff which specifies that the rates authorized thereunder apply "only to export traffic when specific destination beyond Pacific Coast port of export is shown in bill of lading or shipping receipt issued at time of shipment."

Defendant's principal assumption in its brief that the representative bill of lading listed the "destination" of the particular shipment as "U.S.S.R." is erroneous (App. Br. p. 10). An inspection of Exhibit 33 shows "Portland, Oregon" above the line and "(Destination)" immediately below. The notation "U.S.S.R." is found under "Marks," together with some Russian words and code marks. This is not any indication or showing of "destination," and the only destination shown on the bill is "Portland, Oregon." Therefore, no destination beyond Pacific Coast port of export is shown, but merely the Pacific Coast port itself.

Thus, the inference cannot be drawn that any shipping clerk or other railroad employee could conclusively presume that the destination of the shipment was the U.S.S.R., or within the territorial limits of the tariff. The court can take judicial notice of the fact that a substantial part of the supplies given to the Soviet Union during World War II under Lend-Lease were delivered and accepted in this country and were never exported to Russia. Examples of such materials and supplies are coal and oil which were used for refueling Soviet ships in American ports.

Five judges of the Court of Claims in the case of *Union Pacific R. Co. v. United States,* 132 F. Supp. 230, concurred in the determination that the mere notation "U.S.S.R." under "case marks" was a failure to comply with Item 270(a) on the ground that it was an insufficient showing of "specific destination." The court in its opinion stated (132 F. Supp. at p. 232):

> "As set out in our findings, the defendant did not comply with a number of conditions in connection with Items 235, 270, 285 and 290 of TCFB Export Tariff 29 Series. For these reasons the defendant is manifestly not entitled to land-grant deductions on these particular items."

The failure of the government to comply with Item 270 is explicitly set out in paragraph 33 of the court's findings (132 F. Supp. at p. 248):

> "33. The defendant failed to comply with the provisions of Item 270 of TCFB Export Tariff 29 Series, because the specific destination or destinations beyond the Pacific coast ports of export were not shown in any of the bills of lading or shipping receipts issued at the time of shipment. Although the plaintiff knew that these shipments were being exported to Russia or the United Kingdom, the specific overseas destinations were not disclosed to plaintiff and the other rail carriers in the bills of lading or by any other means.
>
> "Most of the Government bills of lading in the Group 5 category contained a reference thereon to 'case marks' on an attached sheet. Below the words 'case marks' on the attachment, there appeared the words 'Technopromimport, U.S.S.R.' After this suit was filed, the General Accounting Office learned that this marking meant that the shipment was imported from the United States by the Union of Soviet Socialist Republics, but this marking did not show the specific overseas destination."

Of principal importance in the *Union Pacific* case was the conceded fact that the form of the commercial uniform through export bill of lading prescribed by the Interstate Commerce Commission included spaces for insertion of the rail destination and the overseas port destination of the shipment (Finding No. 32, 132 F. Supp. at p. 248; see also *Export Bills of Lading,* 235 I.C.C. 63, 64). While government bills of lading were employed here, rather than commercial bills, certainly the commercial bill requirement that the specific port destination be named should be given considerable weight by the court in construing the meaning of "specific destination."

Defendant implies that the construction of Item 270(a) was only a minor issue which was not given any real consideration by the Court of Claims. However, a mere reading of the opinion which, of course, includes the court's Findings of Fact, shows the contrary. The court found noncompliance with a number of items in the export tariff "As set out in our findings" (132 F. Supp. at p. 232). The findings on this question are detailed and explicit (132 F. Supp. at p. 248). The court also stated in its opinion (132 F. Supp. at p. 232):

> "The Group 5 bills which are in issue cover a great many shipments. The complete statements of the facts in reference thereto are set out in findings 18 to 36 inclusive. We can see no good purpose to be served in repeating in detail the facts set out in those findings. They include items 235, 270, 285 and 290."

While defendant argues that the decision of the Court of Claims is of "scant precedential value," it may

be noted that in the very recent case of *United States v. Missouri Pacific R. Company,* 250 F.(2d) 805 (CA5), relied upon by defendant here, the appellate court, on one point in the case, noted that the precise question had been correctly decided by the Court of Claims. The Court of Appeals disposed of the issue summarily "upon the considerations and for the reasons stated in that opinion" (250 F.(2d) at p. 808). The same considerations would appear to govern this court's review of the export rate question, particularly since the government accepted the decision of the Court of Claims in the *Union Pacific* case and did not seek a review by the United States Supreme Court.

On this point, the observation of Judge Prettyman of the United States Court of Appeals of the District of Columbia Circuit in *Land v. Dollar,* 190 F.(2d) 366, 379, cert. dismissed 344 U.S. 806, 73 S. Ct. 7, 97 L. Ed. 628, is most pertinent:

> "There are almost always two sides to a controversy. The loser almost always thinks the court is wrong. The Department of Justice in this instance, although supposed to set the standard for the attitude and conduct of the bar toward the bench, appears upon the papers thus far before us to vent this well-nigh universal dissatisfaction at defeat by instigating an unseemly conflict between two courts, either of which might have had initial jurisdiction of the cause."

Plaintiff agrees that the interpretation of tariff items should be susceptible of practical and ready application. However, it is well settled that terms used in a tariff must be taken in the sense in which they generally are understood and accepted (*Chicago B & Q Ry. Co. v. United*

States of America, 221 F.(2d) 811, 812 (CA7)). Therefore, it is pertinent to consider the definition of "specific" as taken from Webster's New International Dictionary (2d Ed. 1942), p. 2414:

> "Precisely formulated or restricted; specifying; definite or making definite; explicit; of an exact or particular nature; as, a 'specific' statement."

Finally, defendant argues that Items 270(a) might violate Section 1(6) of the Interstate Commerce Act if construed to prohibit defendant from taking advantage of the export rate. This contention would seem quite farfetched in view of the decision of the Interstate Commerce Commission in *War Materials Reparation Cases,* 294 I.C.C. 5, holding that certain export tariff rules, including Item 270(a), were not unjust or unreasonable as applied to the government's wartime shipments. The construction given to Item 270(a) by the Court of Claims is supported by the Interstate Commerce Commission's decision in the reparation cases. In outlining the principal reason for this requirement in Item 270(a), the Commission stated (294 I.C.C. at p. 43):

> "The principal reason for requiring in item 270 that the oversea destination be shown by the shipper was that in meeting competition of the Atlantic and Gulf port routes, embracing ocean lines from those ports directly to the particular oversea destinations, the railroads required knowledge of the destination to identify the transcontinental traffic as in fact tendered for movement to such destination. The requirement that the destination be shown in billing at time of shipment also helped to prevent the application of export rates to shipments that would move freely on the higher domestic rates.

There was no occasion to apply the lower export rates on a shipment forwarded to a Pacific port without knowing its ultimate disposition and only in anticipation of a sale, after arrival at the port, at some indefinite point in the Pacific area. The competition at an oversea destination which warranted such rates would be lacking, and in such circumstances the railroads sought to secure their domestic rates, many of which, as elsewhere stated herein, were severely depressed.

"The complainant contends that in the interest of military security it was impossible to show the specific destinations of its shipments. Conceding the validity of this claim, this circumstance must also be regarded as further convincing proof of the true character of its shipments which plainly were distinguishable from export shipments."

The shipments at bar would appear to fall within the category of the "relatively small amount of lend-lease shipments" which were held by the Commission in the *War Materials Reparation Cases* not to have complied with Item 270(a) (294 I.C.C. at p. 28):

"*Disclosure of specific overseas destination.*— Most of the shipments consisted of war material and supplies consigned to Army or Navy installations at or near Pacific coast ports by direction of the War or Navy Departments. They included a relatively small amount of lend-lease shipments handled through the ports of San Francisco and Los Angeles and nominal amounts for account of other governmental agencies. Most of this material moved westward from transcontinental origins without knowledge by the Government at time of shipment, and, as to much of it, at the time of arrival at the port, of where it would be used although it was anticipated generally that it would be used in the war effort, primarily in the support of troops or naval operations somewhere in the Pacific area, including

> the Pacific Coast States, Alaska, the island of the Pacific, Australia, or Asiatic countries, whenever and wherever dictated by the exigencies of war. Because of the shortage of available ocean shipping space the rail movement was generally directed to the port from which the overseas movement by vessel would be the shortest, in the eventuality of such movement."

Thus, the bill of lading and the stipulated facts show that the destination of these government rail shipments was "Portland, Oregon," and that they were later exported by ocean carrier to Russia. However, these facts are insufficient to make the export tariff applicable. Very recently, the Interstate Commerce Commission stated in *United States v. Western Pacific Railroad Company* (April 21, 1958, Docket No. 32152, sheet 6): ". . . rates set forth in tariff 29 series were not applicable to rail shipments of government property destined to Pacific ports and later transshipped by sea. The situation was fully described on pages 35-39 of the report in *War Materials Reparation Cases,* supra."

At the close of its brief (App. Br. p. 48, footnote 19), defendant states that a 1944 tariff change in Item 270(a) which deleted the word "specific" (R. 46, Ex. 36) cannot "serve as an aid in construing Item 270(a) as actually written." It is to be noted that the government's position on this point is contrary to its brief in the *Union Pacific* case on its motion for a new trial, where it was stated (p. 7):

> "By Supplement No. 14 to TCFB Tariff 29-G, effective May 15, 1944, the word 'specific' in Item 270 was eliminated so that it was no longer required that the destination shown on the bill of lading be

> 'specific.' While these amendments became effective after the pertinent shipments here involved were made in 1942 and 1943, they serve to throw some light on the construction and intention of the language before amended."

Plaintiff respectfully submits, with all deference due the Department of Justice as the agency of the United States charged with the administration of justice, that the attempt by the government in this controversy to relitigate the export tariff question decided adversely to it by both the Court of Claims and the Interstate Commerce Commission is indefensible and should not be permitted.

CONCLUSION

Plaintiff respectfully submits that the judgment below should be affirmed in all respects.

Respectfully submitted,

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